

DR TEH BEE TEE v. DR JOSHUA MOHANRAJ DANIEL & ANOR

HIGH COURT MALAYA, SHAH ALAM

AKHTAR TAHIR J

[WRIT NO: 23NCVC-28-12-2017]

14 FEBRUARY 2018

TORT: *Negligence – Medical negligence – Breach of duty – Pathologist wrongly diagnosed patient’s cancer to be benign – Whether led malignant cancer to spread, causing patient immeasurable physical and mental pain – Whether pathologist negligent in coming to wrong diagnosis – Whether obvious mistakes made by pathologist in diagnosing samples – Failure to ascertain history of patient – Samples sent in small pieces leading to possible inaccurate results – Whether pathologist should have asked for further clarification before carrying out diagnosis – Failure in determining shape of cells correctly – Whether had profound effect on final results – Failure to carry out additional immunostains – Whether breach of pathologist’s duty*

TORT: *Negligence – Medical negligence – Liability – Pathologist wrongly diagnosed patient’s cancer to be benign – Whether led malignant cancer to spread causing patient immeasurable physical and mental pain – Whether hospital vicariously liable for losses suffered by patient as result of pathologist’s negligence – Whether hospital had role to play in patient’s gynaecologist decision to send samples for analysis to pathology department – Breach of pathologist’s duty due to personal failings – Whether pathologist an employee or had any contract of service with hospital – Whether there was antecedent relationship between patient and hospital*

DAMAGES: *Medical negligence – Claim for – Pathologist wrongly diagnosed patient’s cancer to be benign – Whether led malignant cancer to spread, causing patient immeasurable physical and mental pain – Whether depression and mental agony suffered by patient foreseeable – Special damages – Whether financial consequence of divorce between patient and husband too remote to be recoverable – Claim for loss of income – Whether patient would have to undergo future medical and surgical treatment – Claim for future loss of earning or loss of earning capacity – Whether surgery affected patient’s capability – Claim for pain, suffering and loss of amenities – Whether ought to be allowed*

The plaintiff, a consultant cardiologist and the first defendant, a pathologist, were both practicing at Ramsay Sime Darby Hospital (‘the second defendant’). The plaintiff had consulted Dr Tang Boon Nee (‘Dr Tang’), a consultant obstetrician and gynaecologist at the second defendant after having a problem of prolonged menses. Upon consultation, the plaintiff underwent a laparoscopic myomectomy. Three fibroids and endometrial tissues removed during the laparoscopic procedure were sent to the second defendant’s laboratory for histopathological examination. The first defendant

- A examined the tissues in 2013 and reported them to be benign. In 2015, the plaintiff suffered an injury and underwent an ultrasound to rule out any internal bleeding. It was then discovered that she had a mass of 9cm suspected to be ovarian mass. Dr Tang undertook a laparoscopic procedure and removed a vascular tumour from the uterus together with other tissues
- B which were sent to the second defendant's laboratory for histopathological examination. The vascular tumour and other tissues were sent to Dr R Pathmanathan ('Dr Pathmanathan'), a consultant pathologist, who confirmed the tumour to be endometrial stromal sarcoma. A further surgery whereby a total abdominal hysterectomy with bilateral salpingo-oophorectomy was done on the plaintiff and it was discovered that the cancer
- C had spread from the uterus to many parts of the abdomen. It was the plaintiff's claim that the first defendant had in 2013 wrongly diagnosed the cancer to be benign when it was malignant and this led the cancer to spread causing the plaintiff immeasurable physical and mental pain as well as putting the plaintiff at a greater risk of recurrence. For this pain and suffering
- D and other losses, the plaintiff claimed for damages against the first and second defendants. The issues for determination in this case were (i) whether the first defendant was negligent in coming to a wrong diagnosis in 2013 leading to the losses suffered by the plaintiff in 2015; and (ii) whether the second defendant was vicariously liable for the losses suffered by the plaintiff as a
- E result of the negligence of the first defendant.

Held (ordering accordingly):

- (1) There were obvious mistakes made by the first defendant in diagnosing the samples sent by Dr Tang, which required no special skill to determine and these mistakes were admitted by the first defendant himself. It was important to ascertain the history of the patient but in this case the referral letter did not mention, at all, the history of the plaintiff leading her to be treated by the doctor who had sent the samples retrieved during treatment for testing by the first defendant. Further, the samples were sent in small pieces when the ideal sample would be a whole sample which could give more accurate results. Despite being dissatisfied with these shortcomings in the samples sent, the first defendant had gone ahead with the testing. The first defendant should have asked for further clarification from the referral doctor and should have only carried out the diagnosis if he was fully satisfied of an accurate result. This was a duty owed to the plaintiff by the first defendant and he had clearly breached his duty. (paras 12 & 13)
- (1)(a) Another obvious mistake made by the first defendant which did not require any special skill to determine was the shape of the cells tested under the microscope. The first defendant had described the cells as

round or polygonal when in actual fact it was spindle shape. The mistake in identifying the correct shape of the cells had a profound effect on the final results as testified by Dr Pathmanathan. This mistake by the first defendant once again proved the breach of duty towards the plaintiff. Further, the first defendant admitted that he should have carried out two more additional immunostains as done by Dr Pathmanathan and this would have given a completely different finding and the findings would be in line with the finding of Dr Pathmanathan. The first defendant's failure in carrying out the additional immunostains was again a breach of duty on the part of the first defendant. (paras 14 & 15)

(1)(b) The breach of duty of the first defendant was a result of his own personal failings and had no connections with his professional qualification. This personal failings of the first defendant could be described in one word; apathy. The nonchalant attitude of the first defendant in carrying out the diagnosis resulted in a serious breach of the duty of care he owed towards the plaintiff. (para 16)

(2) The antecedent relationship was between the plaintiff and Dr Tang. It was Dr Tang's decision to send the samples for analysis to the pathology department. The second defendant had no role to play in the actions of Dr Tang in sending the samples to the first defendant. Therefore, there was no antecedent relationship between the plaintiff and the second defendant. The second defendant could not be liable for the negligence of the first defendant. Further, the breach of duty in this case was not due to any professional failings of the first defendant but more of personal failings. The second defendant could not be liable for personal failings as opposed to any professional failings of any doctors in the hospital unless the personal failing had been brought to the attention of the second defendant and no actions were taken by the hospital. Also, the hospital could not be vicariously liable for the negligence of the first defendant as the first defendant was neither an employee of the second defendant nor had any contract of service with the second defendant. (paras 22-24)

(3) The depression and mental agony suffered by the plaintiff on discovering the cancer two years later was foreseeable and damages could be given. However, for the plaintiff to go on foreign holiday to calm her nerves in the court's view was certainly not foreseeable by any stretch of the imagination. The court therefore disallowed these items of special damages. The court also disallowed the loss suffered as a result of a breakdown in the plaintiff's marriage to her husband. The financial consequence of a divorce was too remote to be recoverable or would be excluded as being an inherent economic loss or as a matter of policy. (paras 29 & 30)

A (4) The court allowed the costs of treatment of RM96,000 regardless of whether this expense was not borne by the plaintiff. The plaintiff also claimed for loss of income. The document tendered to show loss of income showed loss of income for three months *ie*, at an average of RM40,000 a month and the court therefore awarded this sum. The court further accepted the evidence that the plaintiff, as a result of her ailment and treatment, would have to undergo future medical and surgical treatment. However, the court believed that this future treatment would only be necessary in the event of the recurrence of the disease. The court took into account the likelihood of recurrence only after five years and opted to further reduce the multiplier by five years and allowed a multiplier of eight years of the amount prayed for by the plaintiff. (paras 34-36)

D (5) The court awarded a sum of RM200,000 under the heading of pain and suffering and loss of amenities. However, the plaintiff failed to show any future loss of earning or loss of earning capacity. There was no evidence to show that the surgery had affected the plaintiff's capability as a cardiologist. The court therefore decided not to award any damages for either loss of earning or loss of earning capacity. (paras 37-38)

E **Case(s) referred to:**

Bolam v. Friern Hospital Management Committee [1957] 2 All ER 118 (*refd*)

Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal [2017] 10 CLJ 529 FC (*refd*)

Inas Faizah Mohd Helmi (A Child Suing Through Her Father And Next Friend;

F *Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors* [2016] 2 CLJ 885 FC (*refd*)

Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] 2 CLJ (Rep) 300 FC (*refd*)

Pritchard v. JH Costden Ltd & Anor [1987] 1 All ER 300 (*refd*)

Other source(s) referred to:

Buckley Law Of Negligence And Nuisance, 5th edn, p 523

G *For the plaintiff - Manmohan S Dhillon; M/s P S Ranjan & Co*

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For the 2nd defendant - Tharumarajah C Thiagarajah; M/s Azim, Tunku Farik & Wong

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H **JUDGMENT**

Akhtar Tahir J:

The Brief Facts

I [1] The plaintiff is a consultant cardiologist with the second defendant at Ramsay Sime Darby Hospital previously known as Subang Jaya Medical Centre which is a private hospital whereas the first defendant was a pathologist practicing at second defendant.

[2] The plaintiff consulted one Dr Tang Boon Nee a consultant obstetrician and gynecologist at second defendant after having a problem of prolonged menses. Upon consultation the plaintiff underwent a laparoscopic myomectomy undertaken by the said Dr Tang Boon Nee on 11 May 2013.

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[3] The three fibroids and endometrial tissues removed during the laparoscopic procedure were sent to the second defendant's laboratory for histopathological examination. The first defendant examined the tissues at the second defendant's laboratory in 2013 and reported them to be benign.

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[4] In 2015 the plaintiff suffered an injury while cycling and suffered broken ribs. The plaintiff underwent an ultrasound to rule out any internal bleeding and it was then discovered that she had a mass of 9cm suspected to be ovarian mass.

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[5] Upon discovering this mass on 20 June 2015, Dr Tang undertook a laparoscopic procedure and removed a vascular tumor from the uterus together with other tissues which were sent to the second defendant's laboratory for histopathological examination.

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[6] The vascular tumor and other tissues were sent to Dr R Pathmanathan who was also a consultant pathologist with the second defendant. Dr Pathmanathan confirmed the tumor to be endometrial stromal sarcoma.

[7] On learning of this finding which was communicated by Dr Tang, the plaintiff was referred to Dr Tan Teck Sin for further treatment. Dr Tan advised further surgery whereby a total abdominal hysterectomy with bilateral salpingo-oophorectomy was done on the plaintiff. In layman's term the cancer had spread from the uterus to many parts of the abdomen and had to be removed.

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[8] It is the plaintiff's claim that the first defendant had in 2013 wrongly diagnosed the cancer to be benign when it was malignant and this led the cancer to spread from the uterus to all parts of the abdomen in 2015 causing plaintiff immeasurable physical and mental pain as well as putting the plaintiff at a greater risk of recurrence. For this pain and suffering and other losses the plaintiff is now claiming for damages against the first and second defendants.

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The Issue

[9] The issue for determination in this case is whether the first defendant is negligent in coming to a wrong diagnosis in 2013 leading to the loss suffered by the plaintiff in 2015? The other issue is whether the second defendant is vicariously liable for the loss suffered by the plaintiff as a result of the negligence of the first defendant?

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A **The Court's Finding**

Liability First Defendant

B [10] In all cases of negligence the court has to determine whether the defendant has a duty of care towards the plaintiff and whether the defendant has breached that duty leading to a loss to the plaintiff. The first defendant without doubt had a duty of care towards the plaintiff when he carried out the tests on the samples sent. The nature of duty of care in a professional negligence is well expounded in the case of *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118 as follows:

C ... where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapton omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art ... he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of ... men skilled in that particular art ... Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.

E [11] The next question to whether the defendant has breached his duty of care towards the plaintiff is best reflected in the situation described in the book *Buckley The Law of Negligence and Nuisance* 5th edn at p. 162 under the caption "No special skill required":

F 6.08 In *Royal Brompton Hospital NHS Trust v. Hammond (No 6)* Judge Richard Seymour QC said:

G In a case such as the present, if I am satisfied on the evidence that an obvious mistake was made which would not have been made by any careful person of whatever profession or, indeed, of none, then I can find that person who made that mistake was negligent'.

H Thus in the earlier case of *JD Williams & Co v. Michael Hyde & Associates* the Court of Appeal agreed with the trial judge who held that an architect's decision not to make further investigations into a matter of concern and instead accept at face value assurances received after making of initial inquiries, was not a matter for the application of special professional skill. The *Bolam* test was therefore inapplicable, and the finding that the architect was negligent was upheld

I [12] In this case there were obvious mistakes made by the first defendant in diagnosing the samples sent by Dr Tang removed from the plaintiff, which required no special skill to determine and these mistakes were admitted by

the first defendant himself. The two mistakes made and admitted by the first defendant were before the carrying out of the diagnosis itself. The first defendant had agreed during cross-examination that in carrying out a diagnosis on any sample sent it was important to ascertain the history of the patient. In this case, in the referral letter, there was no mention at all of the history of the plaintiff leading her to be treated by the doctor who had sent the samples retrieved during treatment, for testing by the first defendant.

[13] Further, the first defendant testified that the samples sent were in small pieces when the ideal sample would be a whole sample which would give more accurate results. Despite being dissatisfied with these two shortcomings in the samples sent, the first defendant went ahead with the testing without so much as a phone call to the doctor who had sent the samples. To a question by the court whether he could have asked for clarification or refuse to carry out the tests without getting proper samples the first defendant testified that he was in no position to reject the samples. This was in contradiction to the testimony of the second defendant's chief executive officer Dr Vasuhi Murugiah who testified that the first defendant should have asked for further clarification and could have refused to carry out the tests if he was dissatisfied with the samples. The court decided that under the circumstances of the shortcomings, the first defendant should have asked for further clarification from the referral doctor and should have carried out diagnosis if he was fully satisfied of an accurate result. This was a duty owed to the plaintiff by the first defendant and he has clearly breached this duty.

[14] Further, another obvious mistake made by the first defendant which did not require any special skill to determine is the shape of the cells tested under the microscope. The first defendant described the cells as round or polygonal when in actual fact it is spindle shape and no special skill is required to determine the shape. The shape of the cells can be determined by a lay man by just looking at it. The mistake in identifying the correct shape of the cells has a profound effect on the final results as testified by Dr Pathmanathan. This obvious mistake by the first defendant once again proves the breach of duty towards the plaintiff.

[15] Finally, although the first defendant initially denied carrying out a test called immunostains he retracted his denial when he was confronted by the testimony of Dr Pathmanathan who testified that it was only the first defendant who could have done the immunostains. The court accepted the explanation of the first defendant that it was an oversight on his part when he earlier testified that he did not carry out this particular test and that in fact he had carried out the four immunostains. However the more important aspect of the first defendant's testimony was his admission that he should have carried out two more additional immunostains as done by Dr Pathmanathan and this would have given a completely different finding and the findings

A would be in line with the finding of Dr Pathmanathan. First defendant could give no explanation for his failure in carrying out the additional immunostains. This again was a breach of duty on the part of the first defendant.

B [16] The breach of duty of the first defendant in this case is a result of his own personal failings and has no connections with his professional qualification. This personal failings of the first defendant in this case can be described in one word- apathy. The nonchalant attitude of the first defendant in carrying out the diagnosis resulted in a serious breach of the duty of care he owed towards the plaintiff.

C **Liability Of Second Defendant**

D [17] The second defendant is a private hospital where the first defendant worked at. The evidence led, however, showed that the first defendant was employed and paid by Dr Pathmanathan. He did not have a contract of service with the second defendant although the second defendant provided all the facilities used by the first defendant. The evidence also showed that second defendant carried out a screening of the first defendant and had cleared the first defendant to work at the premise of the second defendant.

E [18] The responsibilities and liabilities of a private hospital in a medical negligence case were extensively considered by the apex court in the case of *Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal* [2017] 10 CLJ 529; [2017] 6 AMR 609. The apex court decided that the doctrine of non-delegable duty applied in Malaysia. The court decided as follows:

F The nature of a non-delegable duty, is in essence, a positive duty to ensure that reasonable care is taken. Viewed in its proper context thus, non-delegable duties are not an anomaly in the law of negligence without a common basis, but founded on established concepts rooted in the general principles of the law of negligence itself.

G [19] The five features highlighted in the *Woodland's* case in the application of doctrine of non-delegable duties is stated as follows:

(1) The claimant is a patient or a child, or for some other reason is especially vulnerable or dependent on the protection of the defendant against the risk of injury. Other examples are likely to be prisoners and residents in care homes.

H (2) There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission itself,

I (i) from which it is possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm, and not just a duty to refrain from conduct which will foreseeably damage the claimant.

- (ii) which places the claimant in the actual custody, charge or care of the defendant, and

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It is characteristic of such relationship that they involve an element of control over the claimant, which varies in intensity from one situation to another, but is clearly very substantial in the case of schoolchildren.

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- (3) The claimant has no control over how the defendant chooses to perform those obligations, ie whether personally or through employees or through third parties.

- (4) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and the third party is exercising, for the purpose of the function thus delegated to him, the defendant's custody or care of the claimant and the element of control that goes with it.

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- (5) The third party has been negligent not in some collateral respect but in the performance of the very function assumed by the defendant and delegated by the defendant to him.

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[20] The apex court in *Dr Kok's* case qualified the application of the features highlighted in *Woodland's* case to the facts and circumstances of each case. The apex court stated as follows:

... Given that the role of the hospital may vary from patient to patient, the extent and scope of the hospital's duty must be ascertained from the facts and circumstances of the case

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[21] In *Dr Kok's* case the apex court decided in respect of the second feature that was mentioned in *Woodland's* case there must be an antecedent relationship between the defendant and the plaintiff. The apex court decided as follows:

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... The personal choice of a patient is not an independent test itself but a relevant factor in applying the *Woodland* analysis, in particular in determining whether there is an antecedent patient-hospital relationship from which to impute an assumption of responsibility by the hospital towards the patient.

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The facts in this case point against the existence of such an antecedent relationship. From the circumstances surrounding the Plaintiff's engagement of Dr Kok and admission to the hospital, it can be inferred that the Plaintiff reasonably expected the operation to be conducted by Dr Kok with due care, wherever Dr Kok referred him to do so; the hospital would merely provide the relevant facilities required for his admission and operation. In respect of the conduct of the operation by Dr Kok, we do not find that the hospital has assumed a positive duty to protect the plaintiff from injury.

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A [22] In this case the antecedent relationship is between the plaintiff and Dr Tang. It was Dr Tang's decision to send the samples for analysis to the pathology department. The second defendant had no role to play in the actions of Dr Tang in sending the samples to the first defendant. Therefore in this case there was no antecedent relationship between the plaintiff and the second defendant. Following *Dr Kok's* case therefore the second defendant cannot be liable for the negligence of the first defendant.

C [23] However, going a step further and in considering the circumstances of this case, even if such an antecedent relationship could be inferred, the breach of duty in this case was not due to any professional failings of the first defendant but more of personal failings. The second defendant cannot be liable for personal failings as opposed to any professional failings of any doctors in the hospital unless the personal failing has been brought to the attention of the second defendant and no actions are taken by the hospital. As an example if a doctor performs his duty while being drunk the hospital cannot be held liable unless the matter had been brought to the attention of the hospital and nothing had been done about it. In this case the first defendant's apathy could not be blamed on the hospital unless there were prior complaints against the first defendant for such an attitude and no action had been taken. In this case, there is no evidence that any complaints had been lodged against the first defendant to the hospital. In short the second defendant cannot be considered liable for the negligence of the first defendant following even the other features mentioned in the *Woodland's* case.

E [24] The hospital as decided in *Dr Kok's* case also cannot be vicariously liable for the negligence of the first defendant as the first defendant was neither an employee of the second defendant nor had any contract of service with the second defendant.

Damages

G [25] In assessing damages guidance can be had from the decision in the case of *Inas Faiqah Mohd Helmi (A Child Suing Through Her Father And Next Friend; Mohd Helmi Abdul Aziz) v. Kerajaan Malaysia & Ors* [2016] 2 CLJ 885 where it was stated as follows:

H It is trite that damages serve as compensation, not a reward, less still punishment (see *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198 ... In assessing damages the court should not be motivated by sympathy and award fair compensation based on cogent evidence. The court should not descend into a domain of speculation. The evaluation of those evidence, which form the basis of any risk or future damages, must therefore still be undertaken. And the trial judge can only evaluate such damages based on recognised balance of probabilities standard ...

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[26] The established practice as to what are the damages that can be claimed in a personal injury claim which are also applicable to losses suffered in a medical negligence claim is stated in *Buckley Law Of Negligence And Nuisance* 5th edn at p. 523 as follows:

‘The practice is now established’, said Lord Denning MR in 1979, when the case of *Lim Poh Choo v. Camden and Islington Area Health* authority was in the Court of Appeal, ‘that in personal injury cases, the award of damages is awarded under 4 main heads. First special damages in the shape of money actually expended. Second, cost of future nursing and attendance and medical expenses. Third, pain and suffering and loss of amenities. Fourth, loss of future earnings’. The latter three headings are collectively referred to as ‘general damages’.

Special Damages

[27] In this case under the head of special damages the plaintiff claimed for five items as follows:

- (i) perbelanjaan perjalanan RM6,900;
- (ii) kos hospital dan rawatan perubatan RM96,000;
- (iii) kos terapi pemulihan sbg RM70,000;
- (iv) kos kehilangan pendapatan (Ogos 2015 to December 2016 RM935,000;
- (v) kos sara hidup tambahan yang timbul dari keretkan perkahwinan RM45,000.

[28] Before evaluating the five items it is best to consider the case of *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] 2 CLJ Rep 300 which decided as follows:

It is a well established principle that special damages in contrast to general damages, have to be specifically pleaded and strictly proved. They are recoverable only where they can be included in proper measure of damages and are not too remote ...

[29] It is the evidence of the plaintiff in this case that due to the shock of discovering the malignant cancer in 2015 it set her off into a depression and to calm herself down she had to travel to various places and countries and this resulted in the travelling expenses and expenses of accommodation and food. To me this was not a proper measure of damages to be given as these trips were unnecessary and could be termed as remote and unforeseeable. The courts in England have decided that morbid depression for witnessing an accident can be compensated. Similarly in this case the depression and mental agony suffered by the plaintiff on discovering the cancer two years later is foreseeable and damages can be given. However, for the plaintiff to

A go on foreign holiday to calm her nerves in the court's view is certainly not foreseeable by any stretch of the imagination. The court therefore decided to disallow these items of special damages.

B [30] The court also disallowed the loss suffered as a result of a breakdown in the plaintiff's marriage to her husband. From the testimony of the plaintiff herself the breakdown of her marriage was a result of her own unreasonable behavior. Further it was the plaintiff who left the marital home on her accord. The court also observed in this case that the plaintiff's husband was present in court on the initial days of the trial.

C [31] In the case of *Pritchard v. JH Costden Ltd & Anor* [1987] 1 All ER 300, the court decided that financial consequence of a divorce was too remote to be recoverable or would be excluded as being an inherent economic loss or as a matter of policy.

D [32] The court in this case allowed the cost of treatment of RM96,000 although the plaintiff by virtue of working with the second defendant the cost of her treatment was borne by the second defendant. The plaintiff in her testimony was willing to forgo this sum of money. However, on the strength of *Dr Kok's* case her counsel submitted for this sum to be given regardless of whether this expense was not borne by the plaintiff.

E In *Dr Kok's* case the court stated as follows:

F The common law has long recognised instances where special damages are recoverable although the Plaintiff has not been left poorer in balance sheet terms. We see no reason how for instance, a claim for care gratuitously provided by a Plaintiff's parents in *Marrapan* should be treated in any respect differently from a claim for medical expenses covered under an insurance policy. As such we consider the description of special damages as 'out of pocket expenses' as an illustration for general guidance, and is not meant to be taken literally as a conclusive requirement in every case.

G Further on the court stated as follows:

H It remains to be addressed the suggestion that the Plaintiff would be unjustly enriched if, having had the medical expenses paid for by the insurer, he is allowed to claim the same expenses from the surgeon. At the outset we agree with the Court of Appeal that unjust enrichment cannot be used to diminish the operation of s. 28A(1)(a) which caters for specific circumstances such as the present case, for, equitable principles cannot operate to defeat clear statutory provisions ...

I [33] Finally on special damages plaintiff claimed for loss of income from August 2015 to December 2016. There were no documents produced by the plaintiff to prove the loss of income for the period claimed. The document tendered to show loss of income is P123 which shows loss of income for three months ie, at an average of RM40,000 a month. The court therefore awarded this sum as loss of income.

General Damages

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Cost Of Future Medical And Surgical Treatment And Surveillance

[34] The court accepted the evidence that the plaintiff as a result of her ailment and treatment has to undergo future medical and surgical treatment. The four treatments identified are monthly hormone treatment in the sum of RM900, yearly MRI or CT scan in the sum of RM2,000, future surgery RM30,000 and the cost of chemotherapy in the sum of RM5,000 per cycle.

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[35] The court however believed that this future treatment would be only necessary in the event of the recurrence of the disease. There is evidence in this case that the earliest the disease can recur is in five years' time and the chance of recurrence is quite high.

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[36] The plaintiff prayed for future treatment based on life expectancy of a Chinese woman in Malaysia which is 70 years old minus the plaintiff's age of 51 years and to deduct 30% for exigencies leaving a multiplier of 13 years. The court while accepting the plaintiff's calculation took into account the likelihood of recurrence will only be after five years. The court therefore opted to further reduce the multiplier by five years and allowing a multiplier of eight years of the amount as submitted by the plaintiff.

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Pain And Suffering And Loss Of Amenities

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[37] The court took note that as a result of the negligence of the first defendant the plaintiff suffered considerable pain and suffering which she has highlighted and described in her testimony. The court in accepting and believing the testimony of the plaintiff on this awarded a sum of RM200,000 under this head of damages. This sum also covers any future pain and suffering as a result of further treatment and surgery.

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Loss Of Earning Capacity And Future Loss Of Earnings

[38] In this case the plaintiff failed to show any future loss of earning or loss of earning capacity. From the financial statement of the plaintiff tendered by the plaintiff it could be seen the plaintiff apart from initial period of one or two months earned as much as she was earning before the surgery. There is no evidence led to show that the surgery had affected the plaintiff's capability as a cardiologist. The court therefore decided not to award any damages for either loss of earning or loss of earning capacity.

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[39] The court allowed a 4% interest on special damages from August 2015 to the date of judgment and 8% for general damages from date of service of writ to date of judgment and post judgment of 8% from date of judgment till date of settlement.

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A [40] Finally, the court allowed a cost of RM70,000 for the plaintiff against the first defendant and a cost of RM20,000 for the second defendant against the plaintiff.

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